THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2005-0086, PC Production Temps, Inc. v. Abatement International/Advatex Associates, Inc., the court on March 7, 2006, issued the following order:

The defendants, Abatement International/Advatex Associates, Inc., appeal an order of the trial court finding they had an implied contract with the plaintiffs, PC Production Temps, Inc. We vacate and remand.

In finding an implied contract between the parties, the trial court did not specify whether the contract was implied in fact or implied in law. The defendant contends that because the trial court ruled against the plaintiff on its unjust enrichment claim, it could not have found an implied in law contract. See Morgenroth & Assoc's, Inc. v. Town of Tilton, 121 N.H. 511, 514 (1981) (implied in law contract is not contract but rather legal remedy imposed by court without reference to assent of obligor). In its brief, the plaintiff states that it does not disagree that the court found the contract was implied in fact.

"An implied in fact contract is a true contract that is not expressed in words; the term of the parties' agreement must be inferred from their conduct." Id. The plaintiff has the burden of producing evidence from which the intention of the parties may be discovered, the nature and extent of their obligations ascertained and their rights determined. Maloney v. Company, 98 N.H. 78, 81 (1953).

In this case, the plaintiff was a third tier subcontractor. The defendant was the prime contractor who subcontracted its work to New Hampshire Demolition, Inc. (NHD), who subcontracted to C-4 Asbestos Abatement and Demolition, Inc. (C-4), who subcontracted to the plaintiff. In its order granting summary judgment to the defendant on the plaintiff's unjust enrichment claim, the trial court found that the defendant had paid the prime subcontractor for the benefit ultimately conferred by the plaintiff: "Given Advatex's undisputed assertion it paid [the prime subcontractor] for all labor associated with the asbestos removal, the court does not find it unconscionable for Advatex to retain any benefit it received from [the plaintiff's] labor."

In its subsequent final order, the trial court found that the defendant employed a site supervisor who met with the plaintiff's owner on a daily basis. When the plaintiff was not paid for its work by C-4, its owner complained to the site supervisor, who faxed the invoices to the defendant's president. The court further found that the site supervisor had the apparent authority to approve the

invoices. The record, however, does not support this conclusion. When the plaintiff's owner went to the site to complain about not being paid, she testified that the site supervisor told her that she would have to speak to the defendant's president. The owner also testified that the site supervisor told her that she would have to deal with the president "to see if we can send you a check" and that she was told to call the defendant's president because he was the one in charge of payment.

The trial court also cited two party checks issued by the defendant to the plaintiff and NHD and a February 9, 2000 letter from the defendant to the plaintiff as evidence of a contract. The two party checks, however, support the defendant's assertion that its contract was with NHD and that it advanced payment to the plaintiff because NHD was financially incapable of doing so. Nor does the February 9, 2000 letter support the trial court's finding that the parties had reached a meeting of the minds. The letter requested verification from the plaintiff of the actual amount the plaintiff had paid its workers to resolve a discrepancy between wages paid and the prevailing wage. According to the plaintiff's owner's testimony concerning the terms of the alleged contract, she was to provide invoices to the defendant and be paid for the plaintiff's work. The discrepancy cited in the February 9, 2000 letter would have been irrelevant under the terms of the contract that she alleged had been established.

Indeed, the only evidence of any contract in fact was presented by the plaintiff's owner's testimony wherein she described her conversations with the defendant's president. Yet the trial court stated in its order that whether the plaintiff's owner ever spoke to the defendant's president was irrelevant.

Because whether conversations took place between the plaintiff's owner and defendant's president is relevant to a determination of whether a contract in fact was established, we vacate the trial court's ruling and remand for additional findings and rulings in accordance with this order.

Vacated and remanded.

BRODERICK, C.J., and DUGGAN and GALWAY, JJ., concurred.

Eileen Fox
Clerk